

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

BURT JELLISON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

PCHB No. 88-124

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

THIS MATTER, the appeal of the denial by the Department of Ecology of a request for a seasonal change of point of diversion and place of use of a surface water right from Bonaparte Creek, came on for formal hearing before the Board on September 8, 1988, in Tonasket, Okanogan County, Washington. Wick Dufford presided for the Board. Judith A. Bendor and Harold S. Zimmerman have reviewed the record. The proceedings were reported by Bibi Carter of Gene Barker and Associates.

Burt Jellison represented himself. The Department of Ecology was represented by Charles B. Roe, Jr., Senior Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Respondent Department of Ecology is a state agency charged with responsibility for allocation and regulation of surface and ground waters within Washington state.

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II

Appellant is a landowner and farmer in Okanogan County. His property includes lands within Sections 2 and 3 of Township 36 North, Range 28 East Willamette Meridian within the Bonaparte Creek drainage, a part of the Okanogan River Basin.

III

On August 7, 1988, Jellison asked Ecology to approve a seasonal change of point of diversion and place of use to irrigate an alfalfa field of about 40 acres located on the property described above. The water right identified as the object of the change request is appurtenant to property owned by Henry Breshears within Sections 27 and 28, of T.37.N., R. 29 E.W.M. The Breshears' right is a Class V right (priority 1901) confirmed by the Bonaparte Creek Adjudication in 1979. Department of Water Resources v. A & C Grazing Assoc., Inc., et al., Okanogan County No. 17787. The Class V right is for the diversion from Bonaparte Creek of up to .50 cfs (cubic feet per second) for irrigation of 25 acres from May 1 through October 31, limited to 100 acre-feet annually.

IV

By letter dated August 16, 1988, Ecology denied Jellison's request. Jellison immediately appealed to the Pollution Control Hearings Board, by letter dated August 18, 1988. On August 26, 1988, the Board scheduled a conference on the matter to occur on September 2, 1988. After the conference, the Board held an expedited hearing on

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September 8, 1988. Within several days thereafter, the Board provided the parties with its decision on the matter orally. This document memorializes that oral decision.

#### V

In the Adjudication decree, no Bonaparte Creek rights were confirmed to the property Jellison seeks to irrigate by the request at issue. The only rights appurtenant to that parcel are two certificates (priority 1979) for use of water outside the normal irrigation season. Both of these certificates limit diversions to one month a year -- April.

#### VI

Bonaparte Creek is about 30 miles long, flowing generally in a westerly direction to its confluence with the Okanogan River at Tonasket. Breshears' property is approximately five to six miles upstream of Jellison's. In the intervening reach, a major tributary (Peony Creek) flows into Bonaparte Creek from the Aeneas Valley to the south.

#### VII

During the low-flow time of year (July-August-September), natural water flows in Bonaparte Creek above Peony Creek are highly variable, being principally dependent on seasonal snow melt. In drought years, this "north branch" exhibits gaining and losing reaches but, in general, is reduced to extremely limited flows (excluding any releases from stored waters).

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1 By contrast, the flows in the Peony Creek branch are sustained by  
2 groundwater discharges just above its mouth and remain fairly constant  
3 throughout the dry season. These flows, of course, improve the water  
4 picture in the lower portion of Bonaparte Creek.

#### 5 VIII

6 The evidence presented convinced the Board that in the period of  
7 1988 when the change request was made, there was insufficient natural  
8 flow at Breshears' point of diversion to accomplish the irrigation  
9 sought by Jellison.

#### 10 IX

11 As the Adjudication decree indicates, there is intense  
12 competition for the waters of Bonaparte Creek. The supply is not  
13 always adequate to the task of supplying all right holders. Chapter  
14 173-549 WAC closes Bonaparte Creek (as well as other Okanogan  
15 tributaries) to further appropriations from May 1 to October 1 each  
16 year.

17 In 1988, right holders both below and above Jellison's diversion  
18 were experiencing difficulty in meeting their irrigation needs. The  
19 evidence presented convinced the Board that Jellison's use of water at  
20 his point of diversion and place of use in the amount allowed to  
21 Breshears in the Class V right would interfere with the rights of  
22 others, both senior and junior.

#### 23 X

24 Considerable testimony was offered about the intent of Breshears  
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1 regarding further use of his right when Jellison applied for the  
2 change. We find that he was not exercising the right at the time. We  
3 make no findings as to what he may have intended.

#### 4 XI

5 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
6 adopted as such.

7 From these Findings of Fact, the Board comes to the following

#### 8 CONCLUSIONS OF LAW

##### 9 I

10 The Board has jurisdiction over the parties and the subject  
11 matter. Chapters 43.21E RCW and 90.03 RCW.

##### 12 II

13 Temporary (or seasonal) changes of point of diversion and place  
14 of use are governed by RCW 90.03.390 which allows for such changes  
15 when they can be made "without detriment to existing rights."

16 Because we have found that the change proposed here would  
17 interfere with existing rights, we conclude that the granting of the  
18 change would violate RCW 90.03.390.

##### 19 III

20 Moreover, in order to move a right from one place to another,  
21 even temporarily, it is first necessary to define the scope of the  
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26 FINAL FINDINGS OF FACT,  
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1 right to be moved. The scope of a right is no greater than the amount  
2 of use which is exercisable at the original place of use. See Schuh  
3 v. Department of Ecology, 100 Wn.2d 180, 667 P.2d 64 (1983).

4 In the instant case, there was insufficient water which could be  
5 used at the original site to fulfill the requirements at the proposed  
6 new locale. We conclude that this situation provides an additional  
7 proper reason for denying the change requested. To grant it would be  
8 to enlarge the right.

9 IV

10 Ecology has a theory that the right cannot be temporarily  
11 transferred if the owner thereof intends to cease using it for the  
12 rest of the season at the original location. Because we sustain the  
13 agency's ruling on other grounds, we decline to rule on this theory.

14 V

15 Any Findings of Fact which is deemed a Conclusion of Law is  
16 hereby adopted as such.

17 From the Conclusions of Law, the Board enters the following  
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(6)

ORDER

The Department of Ecology's denial of the request for temporary change of point of diversion and place of use is AFFIRMED.

DONE this 19th day of January, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Chairman

Judith A. Bendor

JUDITH A. BENDOR, Member

Harold S. Zimmerman

HAROLD S. ZIMMERMAN, Member